FILED
SEP 27 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 355

THE PANAMA COCA-COLA BOTTLING COMPANY,
Petitioner,

vs.

PEGGY RUTH CARMACK AND RALPH E. CARMACK,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

CICERO C. SESSIONS,
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APPENDIX A.

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Eastern District of Pennsylvania
Fourth Floor, U. S. Courthouse
Ninth and Market Streets
Philadelphia 7, Pa.

November 26, 1951

Jacob Kossman, Esquire
Commercial Trust Building
Philadelphia, Penna.

In re: FRANK PALUMBO

Dear Mr. Kossman:

Pursuant to the application of Max H. Goldschein, Special Assistant to the Attorney General, and the Order of Court entered on October 30, 1951, the United States filed an Amended Petition, together with the supplemental affidavits of Max H. Goldschein and James J. Gallagher in the above entitled case.

Through an inadvertence, I failed to mail you copies of the documents that were filed.

A complete set of the aforesaid documents are enclosed herewith. Please accept my apologies.

Sincerely yours,

(Signed) VINCENT P. RUSSO
VINCENT P. RUSSO,
Special Assistant to the Attorney General.

Enclosures

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

May it Please the Court:

The petitioner, The Panama Coca-Cola Bottling Company, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

I. Statement of the Matter Involved

Several issues are presented to this Court. It is not controverted that petitioner is a corporation organized and

existing pursuant to the laws of the Republic of Panama with its domicile in the City of Panama, Republic of Panama, nor is it controverted that respondents are citizens of the United States resident in the Canal Zone (R. 2). Suit was filed by respondents (plaintiffs) in the United States District Court for the District of the Canal Zone to recover damages from petitioner (defendant) for alleged personal injuries sustained by one of respondents when struck by a motor vehicle owned by petitioner driven, allegedly, by petitioner's employee. The alleged accident occurred in the City of Colon, Republic of Panama (R. 2-7).

A principal issue presented is whether or not the appeal to the Circuit Court of Appeals was properly taken inasmuch as the District Court had rendered an opinion sustaining a motion to quash service of summons and to set aside the Marshal's return, "with exceptions to plaintiff," but no formal order or decree was rendered or entered, and no order, decree or judgment was ever rendered dismissing the action, on any jurisdictional or other grounds (R. 21-26). The holding of the Court referred to in the notice of Appeal (R. 26) dated September 15, 1950, is obviously nothing more than an opinion of the Court. There had been a prior service, motion to quash which had previously been sustained by the District Court, also "with exceptions to plaintiff." (R. 9-15). But in the first instance a formal order was rendered, filed and entered on May 2, 1950 (R. 15). Notwithstanding the fact that after rendition of that order respondents (plaintiffs) proceeded with their suit by filing an amended complaint (R. 16-18), and having issued and served an alias summons (R. 18-20), they included in their notice of appeal the first order above referred to.

Issue is thus squarely presented whether or not the opinion of September 15, 1950, was a final decision, or purported so to be as held by the Circuit Court of Appeals, so as to be

appealable (28 U.S.C. 1291). The Circuit Court did not pass upon whether or not the order rendered after the first opinion was appealable, but if it is to be concluded, as we respectfully contend it should be, that no appeal could lie thereto, then validity of the appeal from the order of May 2, 1950, is also squarely at issue. However, even if the opinion of September 15, 1950, is tantamount to an order, it did not have the effect of finally ending the suit. Respondents (plaintiffs) could and should have obtained the rendition and entry of an order identically as had been done previously. But such an order would no more have finally ended the suit than did the order of May 2, 1950. Respondents would not even then have exhausted their recourse under Canal Zone, as it appears that if the allegations in their amended complaint is true that petitioner has property in the Canal Zone subject to the jurisdiction of its Courts (R. 18), then respondents could have sought nonresident attachment in the same suit pursuant to Title 4, section 351, Canal Zone Code.

It is contended, therefore, that if the opinion of September 15, 1950, is properly to be considered as tantamount to an order, it is no more than as interlocutory order from which no appeal lies (28 U.S.C. 1292). The order of May 2, 1950, also appealed from, is clearly interlocutory in character and not appealable. Consequently, the motion to dismiss the appeal should have been sustained.

This cause of action arose in the Republic of Panama and its prosecution in the Canal Zone has raised other serious issues as to which it is contended the Circuit Court of Appeals erred. Summons was initially served upon petitioner through the Executive Secretary of The Panama Canal (R. 7-9), the officer designated by Title 3, section 221, for such service absent appointment of an agent for service, which was the case here. After that service was quashed,

respondents filed an amended complaint alleging appointment by petitioner of Verne D. Calloway as its agent for service of process in the Zone (R. 16). Alias summons was then issued and served upon Calloway (R. 18-20). Issue is thus presented whether valid service could be made in either instance, that is, whether both the statutory and the appointed agent could have been properly and validly served in a suit on a cause of action not arising out of or in connection with petitioner's business, if any, in the Canal Zone, and in proceedings based on an alleged tort committed in a foreign country as to which petitioner had not consented to be sued in the Canal Zone.

The nature of the District Court and the limitations of its jurisdiction are relevant in respect of this issue as it is apparent that the Circuit Court of Appeals, erroneously it is contended, considered the District Court to be the same as a United States District Court created by the Congress pursuant to Article III of the Constitution, with its jurisdiction to be determined by general federal statutes and decisions.

There can be no argument that the United States District Court for the District of the Canal Zone is a legislative Court and is not a constitutional Court of the United States, and that the Congress may by statute broaden or limit its jurisdiction. In respect of litigation between non-residents, the Congress has limited the jurisdiction of that Court, so that it may not exercise jurisdiction as broadly as may the constitutional United States District Courts. Title 4, section 121, Canal Zone Code. Moreover, the nature of the Canal Zone, and its unusual political and geographical position, have always impelled consideration of not encroaching unduly upon the jurisdiction of the Courts of the Republic of Panama. See letter of the President to the Secretary of War, October 18, 1904, *U. S.* v. *Williams*, 3 Canal Zone

Reports 297, 300; *Wallingford & Arango* v. *McCarty,* 69 F. Supp. 1000, 1003 (D. C., C. 3., 1940). The nature of the Zone and the nature of its District Court, as well as the public policy which has induced the limitation of the Court's jurisdiction, make the Court more comparable to a court of one of the states, and consequently such decisions as *Louisville & N. R. Co.* v. *Chatters,* 279 U. S. 320; *Simon* v. *Southern R. Co.,* 236 U. S. 115, and *Morris & Co.* v. *Skandinavia Ins. Co.,* 81 F. 2d 346 (CCA 7) have application, and not the general federal decisions relied upon by the Circuit Court of Appeals in reaching its conclusion.

The issues presented by this petition are, therefore, as follows. The appeal herein was not from a final judgment, the respondents (plaintiffs) could and should have pressed their suit further, and the opinion of the District Court, if tantamount to an order, as well as the earlier order appealed from, were no more than interlocutory orders not appealable. In addition, agent for service of process for petitioner, both the Executive Secretary of The Panama Canal and the subsequently appointed agent, could only be served with summons in a suit on a cause of action arising from business transacted by petitioner in the Canal Zone, and service could not be validly made upon either of them, considering the limited jurisdiction of the District Court, on the cause of action in this suit arising in the Republic of Panama.

II. This Court Has Jurisdiction

This Court has explicit authority to review by certiorari cases of this kind "before or after rendition of judgment or decree * * *." (28 USC 1254) On the questions of finality of the opinion or orders appealed from, inherent in which is whether or not the Circuit Court of Appeals exceeded its jurisdiction (28 USC 1291, 1292; *Shanferoke*

Coal & Supply Corp. v. *Westchester Service Corporation,* 293 U. S. 449), in prior similar cases, such as *Rexford* v. *Brunswick-Balke-Collender Co.,* 228 U. S. 339, and *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541, this Court has granted certiorari. It does not appear here that the Circuit Court of Appeals has decided these questions in conformity with the above cited applicable decisions of this Court and in addition is in direct conflict on these questions with the Court of Appeals for the Ninth Circuit (*Wright* v. *Gibson,* 128 Fed. 865; *Peoples Bank* v. *Federal Reserve Bank,* 149 F. 2d 850; *Cole* v. *Rustgard,* 68 F. 2d 316), the Court of Appeals for the Eighth Circuit (*Lockwood* v. *Hercules Powder Co.,* 172 F. 2d 775), and the Court of Appeals for the District of Columbia (*David* v. *District of Columbia,* 187 F. 2d 204).

The questions involving whether or not petitioner is present in the Canal Zone sufficiently to be sued there on a cause of action arising in a foreign country are among those of which this Court has frequently taken jurisdiction and granted certiorari, as for example in *Louisville & N. R. Co.* v. *Chatters,* 279 U. S. 320, and *Mississippi Publishing Corporation* v. *Murphree,* 326 U. S. 438. If it be true, as we contend, that from the nature of the Canal Zone and its District Court the latter is comparable to a court of one of the states, then it appears that the decisions of this court represented by *Louisville & N. R. Co.* v. *Chatters, supra,* and *Simon* v. *Southern Railway,* 236 U. S. 115, have application rather than the rules of *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100; *Bank of America* v. *Whitney Bank,* 261 U. S. 171, *People's Tobacco Co.* v. *American Tobacco Co., Stewart* v. *B. & O. R. Co.,* 168 U. S. 445, and *International Shoe Co.* v. *Washington,* 326 U. S. 310. Conflict in the decisions of this Court warrant the grant of certiorari. *U. S.* v. *Chicago, M. St. P. & P. R. Co.,* 312 U. S. 318, 772.

Moreover, the nature of the Canal Zone and the attributes of sovereignty exercised over it by the United States (33 Stat. at L. 2234; *Wilson* v. *Shaw,* 204 U. S. 24; *Canal Zone* v. *Christian,* 1 Canal Zone Reports 1; *U. S.* v. *Williams-Simmonds,* 3 Canal Zone Reports 397), including the jurisdiction as well as the nature of its courts, are directly involved and, because of the federal statutes establishing and limiting the jurisdiction of the District Court, there are presented important questions of federal law which have not been but should be settled by this Court. This Court many times has granted certiorari for this reason as in, for example, *Miles* v. *I. C. R. Co.,* 315 U. S. 698, 316 U. S. 708, and *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U. S. 36.

The pertinent statutes as to the District Court, its jurisdiction and limitations thereon as applicable here are as follows:

> "There shall be in the Canal Zone one district court, to be known and designated as the United States District Court for the District of the Canal Zone. There shall be two divisions of said district court, one including Balboa and the other including Cristobal, and the boundaries of the divisions shall be determined by the President.
>
> There shall be one district judge of the said district. Terms of the district court shall be held in the Balboa and Cristobal divisions at such times as the judge may designate by order.
>
> The rules of said district court shall be prescribed by the district judge."
>
> 48 USC 1344; c. 91, sec. 2, 47 Stat. 815.

> "The said district court shall have jurisdiction of:
>
> All criminal cases wherein the punishment that may be imposed exceeds a fine of $100 or thirty days' imprisonment or both;
>
> All cases in equity;

All cases in admiralty;

All cases of divorce and annulment of marriage;

All cases at law involving principal sums exceeding $500;

All appeals from judgments rendered in the magistrate's courts;

All cases and proceedings involving laws of the United States applicable to the Canal Zone;

All other matters and proceedings wherein jurisdiction is conferred by the codes of law and procedure of the Canal Zone.

The jurisdiction in admiralty herein conferred upon the district judge and the district court shall be the same as is exercised by the United States district judges and the United States district courts, and the practice and procedure shall be the same as in the United States district courts."

48 USC 1345; c. 91, sec. 2, 47 Stat. 815.

"Be it enacted, * * *, That the seven titles hereinafter set forth shall constitute the Code of Laws for the Canal Zone and shall, for all purposes, establish conclusively, and be deemed to embrace, all the permanent laws relating to or applying in the Canal Zone in force on the date of enactment of this Act, except such general laws as relate to or apply in the Canal Zone. * * *"

Sec. 1, Act of June 19, 1934, Public Law No. 431;
Enabling Section, Canal Zone Code, p. VII.

"There shall be in the Canal Zone one district court, to be known and designated as the United States District Court for the District of the Canal Zone."

Title 7, sec. 23, Canal Zone Code.

"The district court shall have jurisdiction of:

a. All criminal actions wherein punishment that may be imposed exceeds a fine of $100 or thirty days' imprisonment or both;

b. All cases in equity;

c. All cases in admiralty;

d. All actions for divorce and annulment of marriage;

e. All actions at law involving laws of the United States applicable to the Canal Zone; and

f. All appeals from judgments rendered in the magistrates' courts;

g. All actions and proceedings involving laws of the United States applicable to the Canal Zone; and

Title 7, sec. 23, Canal Zone Code.

"The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment."

Title 4, sec. 1943, Canal Zone Code.

"No civil action or special proceedings shall be brought or proceeded with in the courts of the Canal Zone, in any case in which both of the parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action is one which arose without the territorial limits of the Canal Zone, and the party proceeded against has no property within said territorial limits, subject to the jurisdiction of the Canal Zone courts.

Neither shall any civil action or special proceeding be brought or proceeded with in the Courts of the Canal Zone when both parties, plaintiff and defendant, though citizens of the United States, are found transiently within the limits of the Canal Zone, unless the cause of action is one arising within the said territorial limits, or the party proceeded against has property within the said limits, subject to the jurisdiction of the Canal Zone courts.

This section shall not be construed to exclude from the jurisdiction of the Canal Zone courts cases between parties who have an official or business residence within the territorial limits of the Canal Zone Government, or who reside therein for the purpose of any occupation or employment, notwithstanding that they may not have

acquired a permanent residence within said territorial limits."

Title 4, sec. 121, Canal Zone Code.

The opinion of the United States Court of Appeals for the Fifth Circuit was filed July 17, 1951 (R. 32). Petition for rehearing was denied by that Court on August 10, 1951 (R. 45).

It is contended, therefore, that the Supreme Court has jurisdiction to review the judgment of the Court of Appeals for the Fifth Circuit for the reasons above stated.

III. Questions Presented

The appeal herein was not taken from a final judgment, but from an order and opinion of the District Court interlocutory in character as to which the Congress had not vested the United States Court of Appeals for the Fifth Circuit with appellate jurisdiction.

The statutory agent and the appointed agent for service of process on petitioner could not be validly served in the proceeding on a cause of action against petitioner which arose in a foreign country and was not connected with any activity of petitioner in the Canal Zone, in which place petitioner has no place of business, office or property of any kind.

IV. Reasons Relied upon for Allowance of Writ

This case involves, first, the important question of whether the Court of Appeals has exceeded its jurisdiction by considering the appeal herein. In concluding that the opinion of the District Court dated September 15, 1950, was tantamount to a final decree and was therefore appealable, that court has deviated from the rationale of its own prior decisions in *Simpkins* v. *Simpkins*, 271 Fed. 87, and *Lewis* v.

E. I. duPont de Nemours & Co., 183 F. 2d 29. It is also in this respect squarely in conflict with the Court of Appeals for the Ninth Circuit as that Court held in *Wright* v. *Gibson*, 128 Fed. 865, and *Peoples Bank* v. *Federal Reserve Bank*, 149 F. 2d 850, and *Cole* v. *Rustgard*, 68 F. 2d 316. Its holding is also divergent from that of the Court of Appeals for the District of Columbia in *David* v. *District of Columbia*, 187 F. 2d 204, and that of the Court of Appeals for the Eighth Circuit in *Lockwood* v. *Hercules Powder Co.*, 172 F. 2d 775. Moreover, it does not appear that the test applied by this Court repeatedly, notably and recently in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541, has been followed in this case. Consequently, pursuant to Supreme Court Rule 38, par. (5)(b), the Court of Appeals has not only rendered a decision in conflict with decisions of other courts of appeals on the same matter, but has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Implicit in the other issues presented are important questions of federal law as applicable to the Canal Zone. These embrace construction of Title 3, Sections 221-230, and Title 4, Section 166, Canal Zone Code, as to the validity of the services of summons, as well as limitation of the jurisdiction of the United States District Code for the District of the Canal Zone as provided by 48 U.S.C. 1345, and Title 7, section 23, and Title 4, section 121, Canal Zone Code. Inherent in such latter issue is the nature of the District Court in question and whether or not general federal statutes and decisions are controlling upon it. These questions are important ones which, it is contended, have not been settled but should be settled by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Fifth Circuit, commanding

said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket, No. 13,470, Peggy Ruth Carmack and Ralph E. Carmack, Appellants v. The Panama Coca-Cola Bottling Company, Appellee, to the end that this case may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this court, and for such further relief as to this court may seem proper.

Dated September 27th, 1951.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 355

THE PANAMA COCA-COLA BOTTLING COMPANY,
Petitioner,

vs.

PEGGY RUTH CARMACK AND RALPH E. CARMACK,
Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

I. Opinion of the Court Below

The opinion in the United States Court of Appeals for the Fifth Circuit (R. 32-37) has not yet been reported.

II. Jurisdiction

1. The date of the judgment of the United States Court of Appeals for the Fifth Circuit to be reviewed is July 17, 1951 (R. 37). Rehearing was denied by that court on August 10, 1951 (R. 45).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U.S.C. 1254.

3. The appeal herein is from (a) an opinion of the United States District Court for the District of the Canal Zone which was not followed by any order judgment or decree of that court of final character (R. 22-26) and (b) a prior order of that court in the same action clearly interlocutory in character (R. 10-15), neither of which was a final decision so as to come within the appellate jurisdiction of the Court of Appeals provided by 28 U.S.C. 1291, nor were they interlocutory decisions appealable as provided by 28 U.S.C. 1292. It is contended that the Court of Appeals in this respect has not followed the applicable decisions of this Court and is in conflict with the Circuit Court of Appeal for the Ninth Circuit, the Eighth Circuit and the District of Columbia.

Important questions of Federal law as applicable to the Canal Zone are also presented. Notwithstanding the nature of the Canal Zone and its District Court, and the limitations on the jurisdiction of the latter, it is inescapable that the Court of Appeals viewed it as not distinguishable from a United States District Court created under Article III of the federal constitution in holding that its jurisdiction is to be determined "upon the federal statutes and decisions" rather than upon state law applicable to state courts toward which the District Court is more analagous (R. 35). This relates directly to whether or not petitioner was present in the Canal Zone and legally amenable to service there by process served upon (a) a statutory agent when petitioner had not designated an agent (R. 7-9), and (b) an appointed agent although petitioner had no business office or property in the Zone (R. 16-22), and the cause of action arose in a foreign country and was not connected with any business of petitioner in the Zone (R. 2-6, 32-33). Not only is there thus drawn into serious controversy whether or not under

federal law applicable in the Canal Zone petitioner was validly served in either instance, but there is also involved the important question of whether general federal statutes and decisions have application to questions of jurisdiction of the District Court relating to non-residents, or rather should questions of procedure and substantive law in that respect be determined by the laws which guided the Congress in enacting the statutes applicable to the Canal Zone and the statutes enacted by the Congress applicable only to the Canal Zone and its Courts. If Congress enacted the Canal Zone Code, particularly in respect of qualification of alien corporations, service of process thereon, and limitations on the jurisdiction of the Courts of the Zone as to causes of action asserted against alien corporation, tracking similar statutory provisions as enacted by some of the states, it certainly appears that analogous state laws and decisions construing them are pertinent rather than general federal statutes and decisions (R. 13-14, 23-26).

Moreover, making general federal statutes and decisions applicable to the Canal Zone, as the Court of Appeals has done in this case, raises serious and important question as to whether general federal statutes and decisions have application at all to the Canal Zone except solely where the statutes are made expressly to apply to the Canal Zone, as general federal statutes are not applicable to those courts unless expressly so provided.

These questions, therefore, are important ones which this court has not decided and should decide.

4. The cases believed to sustain the jurisdiction of this Court are as follows:

Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U. S. 449;

Rexford v. *Brunswick - Balke - Collender Co.*, 228 U. S. 339;

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541;
Wright v. *Gibson*, 128 Fed. 865;
People's Bank v. *Federal Reserve Bank*, 149 F. 2d 850;
Cole v. *Rustgard*, 68 F. 2d 316;
Lockwood v. *Hercules Powder Co.*, 172 F. 2d 775;
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Mississippi Pub. Co. v. *Murphree*, 326 U. S. 438;
Simon v. *Southern Railway*, 236 U. S. 115;
Miles v. *I. C. R. Co.*, 315 U. S. 698, 316 U. S. 708;
O'Donnell v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36.

III. Statement of the Case

This has already been stated in the preceding petition in I, Summary Statement of the Matter Involved, which is hereby adopted and made a part of this brief.

IV. Specification of Errors

1. The United States Court of Appeals for the Fifth Circuit erred in holding that no order or decree should have been rendered after the opinion of the District Court dated September 15, 1950, and that such opinion was so far final as to prevent the further prosecution of the suit and was therefore appealable.

2. The Court of Appeals further erred in holding that respondents were without redress except by appeal.

3. The Court of Appeals further erred in construing the statutory limitations on the jurisdiction of the District Court as being determined under the grant of federal jurisdiction and federal statutes and decisions, and in applying such to this case, rather than pursuant to analogous state statutes and decisions.

4. The Court of Appeals further erred in holding that petitioner was present in the Canal Zone and could be served there for the purposes of a suit on a cause of action arising in a foreign country and not connected with petitioner's business, if any, in the Canal Zone.

V. ARGUMENT

Summary of Argument

POINT A.—THE OPINION AND ORDER APPEALED FROM WERE INTERLOCUTORY IN CHARACTER AND WERE NOT FINAL APPEALABLE DECISIONS.

POINT B.—THE DISTRICT COURT IS A LEGISLATIVE COURT COMPARABLE TO THE COURT OF A STATE.

POINT C.—GENERAL FEDERAL LAW DOES NOT APPLY TO THE DISTRICT COURT AND IT IS A COURT OF LIMITED JURISDICTION AS TO SUITS INVOLVING A NON-RESIDENT.

POINT D.—PETITIONER WAS NOT PRESENT IN THE CANAL ZONE FOR VALID SERVICE OF PROCESS TO BE MADE UPON IT.

Point A

The opinion and order appealed from were interlocutory in character and were not final appealable decisions.

1. Disposing first of the order quashing the first service on the Executive Secretary of The Panama Canal, that order is of such an interlocutory character as clearly to be not appealable. After it was rendered, entered and filed, respondents (plaintiffs) filed an amended complaint and alias summons was issued and served. The order, therefore, could not have and did not terminate the suit, and respondents not only had but exercised a remedy other than appeal. It is obvious, therefore, that no appeal could validly lie from that order. 28 USC 1291; *Simpkins* v. *Simpkins,* 271 Fed. 37; *Lewis* v. *E. I. duPont deNemours*

& Co., 183 F. 2d 29; *Wright* v. *Gibson*, 128 Fed. 865; *Cohen* v. *Beneficial Industrial Loan Corporation, supra.*

2. It appears to us to be abundantly clear that respondents could and should have provoked this issuance of an order quashing the second service just as was done in the first instance. The Court of Appeals in this respect appears to us to be in direct conflict on this point with other Courts of Appeal, the decisions of which appear to be clear on the point. See *Wright* v. *Gibson* (CCA 9), *supra; People's Bank* v. *Federal Reserve Bank* (CCA 9), *supra; Lockwood* v. *Hercules Powder Co.* (CCA 8), *supra; David* v. *District of Columbia* (CCA D.C.), *supra.* In deviating from the rationale of its own prior decisions (*Simpkins* v. *Simpkins*, 271 Fed. 87, and *Lewis* v. *E. I. duPont deNemours & Co.*, 183 F. 2d 29) the Court of Appeals appears to us to have failed to follow the pertinent decisions of this court, notably and most recently that in *Cohen* v. *Beneficial Industrial Loan Corporation, supra.* We perceive no square holding other than the opinion below that an appeal may be taken from a court's opinion, and there was obviously here nothing from which an appeal could be taken at the time the notice of appeal was filed.

3. But even if the opinion of the District is properly to be construed as an order, it is not an order of such finality as to be appealable under 28 USC 1291. At most it is an interlocutory order not appealable pursuant to 28 USC 1292. There was no dismissal of the suit, and the cause obviously remained open on the docket of the District Court for further proceedings.

There is significance in the allegation in the amended complaint that petitioner has property within the territorial limits of the Canal Zone subject to the jurisdiction of the Zone's courts. (R. 18) (This will be referred to on another point below.) The Court of Appeals partially based its

conclusion on the allegation (R. 35-36), although it also said that petitioner cannot gainsay that it does not have property in the Canal Zone (R. 34). If that allegation in the amended complaint is true, then respondents did not endeavor to pursue any remedy by way of non-resident attachment. Title 4, sec. 351, Canal Zone Code. As further proceedings could have been prosecuted by respondents, the suit was not possibly terminated as held by the Court of Appeals.

POINT B

The District Court is a legislative court comparable to the court of a state.

1. The United States exercises sovereignty over the Canal Zone, which is a "place subject to the use, occupation and control of the United States for a particular purpose * * *," but it is not in a strict sense an organized territory or even a possession of the United States. *U.S.* v. *Williams-Simmonds,* 3 Canal Zone Reports 297; *Canal Zone* v. *Christian,* 1 Canal Zone Reports 1; *Wilson* v. *Shaw,* 204 U.S. 24. From the outset of its creation, its peculiar geographical and political position *quoad* the Republic of Panama engendered grave caution in the establishment of its courts and the extent to which they would be endowed with jurisdiction. See *U. S.* v. *Williams-Simmonds, supra; Wallingford & Arango* v. *McCarty,* 69 F. Supp. 1000 (DC-CZ).

Although entitled "United States District Court for the District of the Canal Zone," that court is not a district court of the United States established by the Congress pursuant to Article III of the Constitution. Nor is the Canal Zone a district created by the Congress as are those in which the district courts of the United States sit. 28 USC, Chapters 5 and 85. The district court here is separately created by provisions of the Canal Zone Code adopted

in 1934 (Section 1, Act of June 19, 1934, Public Law No. 431, enabling section, Canal Zone Code; Title 7, sec. 23, Canal Zone Code) and by Title 48 USC sec. 1344 *et seq.* That court is therefore not a constitutional court of the United States but is a legislative court created by Congress. From the nature of the Canal Zone government, which has no legislative power, the District Court is much less analogous to a court of a territory than it is to the court of a state, as there is no territorial legislature and consequent dual body of laws to administer, but only one body of law and that as enacted by the Congress. See *American Ins. Co.* v. *356 Bales of Cotton,* 1 Peters 511; *McAllister* v. *U. S.,* 141 U. S. 174; *The City of Panama,* 101 U. S. 453. Cf. *Ex parte Cooper,* 143 U.S. 472; *Hunt* v. *Palao,* 45 U. S. (4 How.) 589; *Ex parte Gon-Shay-ee,* 130 U. S. 343; *Hornbuckle* v. *Toombs,* 18 Wall. 648; *Clinton* v. *Engelbracht,* 13 Wall. 434; *U. S.* v. *Pridgeon,* 153 U. S. 58; *U. S.* v. *Williams-Simmonds, supra; Wallingford & Arango* v. *McCarty, supra.* But even though the district court is created by Congress it is definitely not a "district court of the United States." *Mookini* v. *U. S.,* 303 U. S. 201.

POINT C

General federal law does not apply to the District Court and it is a court of limited jurisdiction as to suits involving a non-resident.

Although certain provisions of the Judicial Code are made applicable to the District Court (See 28 USC 510), it in truth has jurisdiction only as to acts of Congress made expressly and specifically to apply to it and the general laws of the United States where not specifically made applicable in the Canal Zone do not apply there. (See enabling section, Canal Zone Code, *supra,* printed in the foregoing petition.) The jurisdiction of the district court

is not established by the provisions of the Judicial Code applicable to district courts of the United States (28 USC Chapter 85) but is separately established by specific other Congressional enactments, above cited, and the prevailing provision authorizing suit against an alien in any district (28 USC 1391 (d)) has no application in the Canal Zone. Also, The Federal Rules of Civil Procedure have no application in the Canal Zone (28 USC 2072; *Mookini* v. *U. S.*, *supra*).

As to the obtention of jurisdiction over an alien, it is clear, therefore, that the rules applicable in district courts of the United States do not have application here and limitations on the district court's jurisdiction are determinable by law specially applicable in the Canal Zone and not be general federal statutes and decisions. The holding of the Court of Appeals contrary to this premise if it stands therefore makes uncertain, to its courts and its bar, exactly what laws are in force in the Canal Zone, as it has never heretofore been held that general federal statutes and decisions apply in the Zone, for jurisdictional or other purposes. In truth, in the enactment of the Canal Zone Code in 1934, the Congress related, particularly in reference to procedure, to the law of California as it then provided, which law has always had strong persuasive power in the Canal Zone Courts.

In enacting Title 4, sec. 121, Canal Zone Code (printed in the foregoing petition), the Congress tracked similar state enactments (see, for example, *Central Motor Lines* v. *Brooks Trans. Co.*, 36 S. E. 2d 271, 225 N. C. 733, (1945)), and in doing so limited drastically, and to a far greater extent than is applicable to district courts of the United States, the jurisdiction of the district court as to suits involving non-residents. The political considerations mentioned above (*U. S.* v. *Williams-Simmonds*, *supra*, and *Wal-*

lingford & Arango v. *McCarty, supra*) undoubtedly motivated the Congress in thus limiting the district court's jurisdiction in a suit of this nature.

POINT D

Petitioner was not present in the Canal Zone for valid service of process to be made upon it.

The situation obtaining here is not comparable to and is distinguishable from that found in such cases as *International Shoe Co.* v. *Washington,* 326 U. S. 310, cited by the Court of Appeals. Cf. *Bank of America* v. *Whitney Bank,* 261 U. S. 171; *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79; *Stewart* v. *B. & O. R. Co.,* 168 U. S. 445. The cause of action in the *International Shoe Co.* case, *supra,* for example, arose in the State of Washington, which is not the case here. Nor is the district court here a national court with the jurisdiction of such as was involved in *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100. In *Panama Electric Co.* v. *Moyers,* 249 F. 19, and *Theoktiston* v. *Panama R. Co.,* 6 F. 2d 116, also cited by the Court of Appeals, although each cause of action arose in the Republic of Panama, they arose against an American corporation with business and property in the Canal Zone, which is also not the situation here.

As noted above, the allegation of the amended complaint is significant in setting forth that petitioner has property in the Canal Zone, in addition to the original allegations that it was engaged in business there. This was an obvious attempt to set up an alleged state of facts to bring petitioner within the construction of Title 4, section 121, Canal Zone Code, *supra,* that the district court has no jurisdiction over an alien corporation without business, business office or property within the Zone. *Wallingford & Arango* v.

McCarty, supra. It was no more incumbent on Congress than it would be upon a state legislature to make the jurisdiction of the district court broad enough to include adjudication of a transitory cause of action not arising in the Canal Zone. *M. P. R. Co.* v. *Clarendon Boat Oar Co.,* 257 U. S. 533.

Since the district court is not a district court of the United States, is not a territorial court of the United States, but is more nearly comparable to a court of one of the states, the rules applicable in this respect are obviously those as should be applied under state statutes similar to those in force in the Canal Zone. Application of those rules require a conclusion entirely contrary to that indulged by the Court of Appeals. The jurisdictional provisions pertaining to the district court, above cited, do not authorize its courts to entertain a cause of action such as this, similar to the law of California as was construed in *Dunn* v. *Cedar Rapids Engineering Co.,* 152 F. 2d 733 (CCA 9). The statutory provisions effective here are quite similar, if not distinguishable from, the North Carolina statute construed in *Central Motor Lines* v. *Brooks Trans. Co., supra.*

Title 3, section 221, Canal Zone Code (reproduced in Appendix "A" hereto), is indistinguishable from similar statutes prevailing in some of the states. It is a general rule, in substance, that unless the language of the statute requiring the appointment of an agent for service of process is to the contrary or local decisions are to the contrary appointments of agents for service of process by foreign corporations will be construed to exclude causes of action arising outside of the jurisdiction for which the appointment was made. *L. & N. R. Co.* v. *Chatters, supra; Simon* v. *Southern R. Co., supra; Morris & Co.* v. *Skandinavia Ins. Co.,* 81 F. 2d 346 (CCA 7); *St. Clair* v. *Cox,* 106 U. S. 350; *Old Wayne Mut. L. Assoc.* v. *McDonough,* 204

U. S. 8; *Robert Mitchell Furn. Co.* v. *Selden Breck Construction Co.*, 257 U. S. 213; *M. P. R. Co.* v. *Clarendon Boat Oar Co., supra; Chipman, Ltd.* v. *Jeffery Co.*, 251 U. S. 373; *Harmann* v. *U. S. F. & G. Co.*, 64 F. Supp. 36 (D. C. La.); *American Indemnity Co.* v. *Detroit F. & S. Co.*, 63 F. 2d 395 (CCA 5); *Central Motor Lines* v. *Brooks Trans. Co., supra; Dunn* v. *Cedar Rapids Engineering Co., supra.*

To be valid, therefore, the service of process in either instance in this case must necessarily be in connection with business done by petitioner in the Canal Zone or in connection with a cause of action arising in the Canal Zone. On the face of the record neither situation prevails. As Title 3, sec. 221, Canal Zone Code, does not by its terms effect petitioner's consent to be sued in the Canal Zone for an alleged tort committed elsewhere, and the statutes, *supra,* providing the limited jurisdiction of the district court do not authorize suit against an alien corporation such as petitioner in circumstances as are here presented, neither service of process is valid.

VI. Conclusion

The Congress has not vested the United States Court of Appeals for the Fifth Circuit with appellate jurisdiction of an action in which no final decision has been rendered, except in respect of certain interlocutory decisions which is not the case here. The district court has been created as a legislative court, comparable to a court of one of the states, with limited jurisdiction as to suits against a nonresident alien, it never being the intent of Congress that such alien corporation as petitioner be subjected to the jurisdiction of the Canal Zone courts except as to causes of action arising in the Canal Zone or in connection with its business there. General federal statutes and decisions are not pertinent to measure the validity of the services, which are ineffective and invalid by the rules of law applicable in

the Canal Zone. The decision below is based upon inapplicable rules and a misconception of the nature and jurisdiction of the district court, and it should be reversed.

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APPENDIX "A"

"The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as the security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this article provided, in the following cases:

* * * * * * *

3. In an action against a defendant, not residing in the Canal Zone, to recover a sum of money as damages, arising from an injury to property in the Zone, in consequence of negligence, fraud, or other wrongful act."

Title 4, sec. 351, Canal Zone Code:

"No corporation organized under the laws of any State or Territory of the United States or of any foreign country *shall do business in the Canal Zone or maintain an office therein* until it shall have filed with the executive secretary of the Panama Canal; (a) An application for a license setting forth the name of the corporation, the names of its officers and directors, and a statement showing the general nature of the business in which it desires to engage in the Canal Zone; * * * (d). Every corporation must, at the time of filing its application, file in the office of the executive secretary a designation of some person residing within the Canal Zone and the place of business or residence of such person upon whom process issued by authority of or under any law of the Canal Zone may be served * * * Process may be served on the person so designated, or, in the event that such person cannot be found at the place designated or in the event that no such person is designated, then on the executive secretary of the Panama Canal, or his successor in office, and such service shall be valid service on such corporation. * * *" (Emphasis supplied)

Title 3, sec. 221, Canal Zone Code.